

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:

BIG LOTS, INC., *et al.*,¹

Debtors.

Chapter 11

Case No. 24-11967 (JKS)

(Jointly Administered)

Re: D.I. 511

**THE ATHENS, OHIO LANDLORD’S LIMITED OBJECTION TO CURE NOTICE AND
RESERVATION OF RIGHTS**

Athens Shopping Plaza, LLC (the “Athens, Ohio Landlord” or the “Landlord”) files its limited objection, reservation of rights, and joinder (the “Limited Objection”) with respect to the Debtors’ *Notice of Potential Assumption and Assignment of Executory Contracts and Unexpired Leases and Cure Amount* (D.I. 511) (the “Cure Notice”), and in support thereof respectfully states as follows:

RELEVANT FACTS

1. The Landlord is the lessor of Big Lots Store #29, located at 918 East State Street, Athens, Ohio (the “Store”) pursuant to an unexpired written non-residential real property lease agreement between the Landlord and Big Lots Stores – CSR, LLC (the “Tenant”) (as amended from time to time, the “Lease”). The Store is part of a shopping center as that term is defined in

¹ The debtors and debtors in possession in these chapter 11 cases, along with the last four digits of their respective employer identification numbers, are as follows: Great Basin, LLC (6158); Big Lots, Inc. (9097); Big Lots Management, LLC (7948); Consolidated Property Holdings, LLC (0984); Broyhill LLC (7868); Big Lots Stores – PNS, LLC (5262); Big Lots Stores, LLC (6811); BLBO Tenant, LLC (0552); Big Lots Stores – CSR, LLC (6182); CSC Distribution LLC (8785); Closeout Distribution, LLC (0309); Durant DC, LLC (2033); AVDC, LLC (3400); GAFDC LLC (8673); PAFDC LLC (2377); WAFDC, LLC (6163); INFDC, LLC (2820); Big Lots eCommerce LLC (9612); and Big Lots F&S, LLC (3277). The address of the debtors’ corporate headquarters is 4900 E. Dublin-Granville Road, Columbus, OH 43081

11 U.S.C. § 365(b). The Lease is voluminous and may contain confidential or proprietary information. Further, the Landlord believes that the Debtors have a copy of the Lease. Therefore, the Lease is not attached to this Motion; however, a copy of the Lease is available upon request.

2. Big Lots, Inc. and its affiliated Debtors (including the Tenant) filed for Chapter 11 relief on September 9, 2024 (the “Petition Date”).

3. The Lease has not been rejected.

4. The Debtors filed the Cure Notice on October 16, 2024.

5. The Schedule attached to the Cure Notice identified the Lease as a Potential Assumed Contract. See page 8 of 79. Further, the Cure Notice stated a pre-petition Lease cure amount of \$12,871.00 (the “Cure Amount”). The Cure Notice did not identify any post-petition amounts due.²

6. The Cure Notice provides that any landlord that fails to timely object to the potential assumption and assignment of the Lease, the Debtors’ proposed Cure Costs or the ability of the Successful Bidder to provide adequate assurance of future performance shall be forever barred from asserting any objection or claims relating to the assumption and assignment of the Lease.

RELIEF REQUESTED

7. Bankruptcy Code §365(b)(1) prohibits the assumption of an executory contract unless, among other things, there is (a) a prompt cure of any default and (b) adequate assurance of future performance under the contract. Further, because the Store is a part of a shopping center, Bankruptcy Code §365(b)(3) provides additional protections for the Landlord, including (x) the assignee’s financial condition and operating performance must be similar to the Debtor, (y) the

² The Landlord is currently in negotiations with the Debtor regarding a potential amendment of the Lease and files this Limited Objection under compulsion of the Cure Notice’s objection deadline.

assignment is subject to all the provisions of the Lease, including provisions such as radius, location, use or exclusivity and will not breach any such provision in any other agreement, and (z) the assignment will not disrupt the tenant mix or balance.

8. Any assumption of an executory contract must be *cum onere* [taken with all burdens], and include all of the conditions, liabilities, obligations along with any benefits. N.L.R.B. v. Bildisco, 465 U.S. 513, 531 (1984).

9. Further, the cure paid upon assumption and assignment must include all amounts due under the Lease as of the assumption, not just as of the Petition Date.

10. Since the Petition Date, the Tenant has continued to occupy, and the Debtors have received the benefits from the use of the Store.

11. The Landlord does not object to the Cure Amount. Further, amounts for real estate taxes, CAM charges and insurance for periods prior to the Petition Date - but which were customarily billed in September / October of each year remain - due and owing. The amount due for 2023, which was billed September 16, 2024, is \$51,041.85. The amount due for the first nine months of 2024, which would not customarily be billed until the fall of 2025, is \$41,133.08. Break-downs of the forgoing amounts is attached.

12. The Landlord further objects to the Cure Notice to the extent that it seeks to limit liability upon assumption and assignment to only pre-petition arrearages. Any cure payment to the Landlord must include all pre-petition *and* post-petition obligations, including base rent and any other amounts coming due under the Lease, such as CAM charges, RE taxes, insurance, and other amounts due and recoverable under Bankruptcy Code §§ 365(d)(3) and 503(b) and applicable law.

13. There also could be indemnity obligations that have arisen but are not yet known to Landlord. Any order approving the assumption should make clear that the Debtors/assignee is required to comply with all contractual obligations to indemnify and hold Landlord harmless with respect to events that may have occurred before or after the Petition Date, but that are not known to Landlord as of the date of the assumption including, without limitation, claims for personal injury and property damage that occurred at the leased premises and presently unknown deferred maintenance, damage and/or destruction to the leased premises.

14. The Landlord further objects to the Cure Notice to the extent that it seeks to limit the Landlord's rights to adequate assurance of future performance under §§ 365(b)(1) and (3).

RESERVATION OF RIGHTS

15. The Landlord reserves the right to revise, supplement or amend this limited objection.

16. The Landlord also reserves (and does not waive) all other rights, claims, and interests with respect to Lease, the Store, and any related matters, including, without limitation, (a) all rights under 11 U.S.C. §§ 365(b), 365(d)(3), 365(f), and 503(b), and (b) any rights to attorney's fees under the Lease and/or applicable law, and (c) the right to supplement or amend this objection, including additional amounts and obligations which may arise after the filing of this Limited Objection.

JOINDER IN OTHER LANDLORD CURE OBJECTIONS

17. The Landlord joins in any legal objections of other similarly situated shopping center landlords.

WHEREFORE, the Landlord respectfully requests that this Court enter an order (i) granting this Limited Objection; (ii) compelling the Debtors and any assignee to fully comply with

Bankruptcy Code § 365(b) and other applicable law, and (iii) for such other and further relief as is just and proper.

Dated: November 4, 2024
Wilmington, DE 19801

ESBROOK P.C.

/s/ Scott J. Leonhardt
Scott J. Leonhardt (DE 4885)
1000 N. West Street
Suite 1200
Wilmington, DE 19801
(Phone) 302.650.7540
E-Mail: scott.leonhardt@esbrook.com

and

Robert B. Berner (0020055)
Bailey Cavalieri LLC
409 E. Monument Ave., Suite 103
Dayton, Ohio 45402
(Phone) 937.223.0254
E-Mail: rberner@baileycav.com

Counsel for the Landlord

EXHIBIT 1

Athens Shopping Plaza

Butt Realty, Inc.
PO Box 81
Chillicothe, OH 45601
(740) 775-0311
(740) 775-0312 (fax)
spbutt@bright.net

September 16, 2024

Big Lots, Inc. Store # 00029B
Lease Administration Dept.
4900 E. Dublin-Granville Rd.
Columbus, OH 43081-7651

In accordance with your lease with the Athens Shopping Plaza
in Athens, Ohio, the following charges are due as computed.

2023 Total common area expense	\$30,084.77	
2023 Insurance (property, liability & flood)	\$21,670.98	--excludes umbrellas
2023 Real estate taxes	<u>\$77,899.82</u>	

\$129,655.57

This is equal to

178.50 cents per square foot

Your pro-rata percentage is the square footage of your space
divided by the total square footage of leasable space in the Center

35,522
72,637

This is equal to 48.903%

Your obligation under the lease is the product of the charges and your pro-rata percentage:

	CAM	insurance	real estate tax	
Center total	\$30,084.77	\$21,670.98	\$77,899.82	
times 48.903%	\$14,712.49	\$10,597.86	\$38,095.70	
partial year factor	100.00%	100.00%	100.00%	12 of 12 months
	\$14,712.49	\$10,597.86	\$38,095.70	
cap amount	<u>\$19,980.00</u>			
Your pro-rata share	\$14,712.49	\$10,597.86	\$38,095.70	
Total		\$63,406.05		
less prior payments		<u>\$12,364.20</u>		
Amount due		<u>\$51,041.85</u>		

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October 29, 2024

All amounts are for nine months

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2024 Total common area expense	\$34,443.71	
2024 Insurance (property, liability & flood)	\$16,338.90	--excludes umbrellas
2024 Real estate taxes	<u>\$58,424.87</u>	

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cap amount	<u>\$19,980.00</u>			
Your pro-rata share	\$16,844.16	\$7,990.29	\$28,571.78	
Total		\$53,406.23		
less prior payments		<u>\$9,273.15</u>	Nine months	
			1030.35 per month	
Amount due		<u>\$44,133.08</u>		

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Year 2023 Common Area Expense, Insurance and Real Estate Tax report.

Parking lot sweeping	\$3,198.90 ✓	Contract Sweepers 4141 Rockside Road Seven Hills, OH 44131
Snow removal	\$6,557.50 ✓	Network Services 15396 Needles Rd. Johnstown, OH 43031
Mowing	\$2,895.72 ✓	Xtream Clean and Green 6330 Wingrove Road Athens, OH 45701
Striping parking lot and Patching	\$3,900.00 \$1,900.00	Steve & Stanley Stevens PO Box 263 Chillicothe, OH 45601
Repair storm drains	\$1,800.00	
Parking lot litter	\$4,944.00	Misty Burton 910 East State St. Athens. OH 45701
Parking lot lighting	\$4,888.65	American Electric Power
Total Common Area Expense	\$30,084.77	
Insurance	Fire & extended	Gerber Insurance Agency PO Box 261 Chillicothe, OH 45601
	flood	
Less Atomic CU Land Lease	\$3,465.00 (\$1,338.00)	
	\$21,670.98	
Real Estate Tax	first half	Athens County Treasurer
	second half	
Less Atomic CU Land Lease	\$43,212.73 \$43,212.73 (\$8,525.64)	
	\$77,899.82	

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Nine months

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Snow removal	\$12,980.64	Network Services 15396 Needles Rd. Johnstown, OH 43031
Mowing	\$1,769.60	Xtream Clean and Green 6330 Wingrove Road Athens, OH 45701
Striping parking lot and Patching	\$5,800.00 \$2,000.00	Steve & Stanley Stevens PO Box 263 Chillicothe, OH 45601
Parking lot litter	\$4,116.00	Misty Burton 910 East State St. Athens. OH 45701
Parking lot lighting	\$2,371.33	American Electric Power
Total Common Area Expense	\$34,443.71	
Insurance	Fire & extended	\$15,507.90 nine months
	flood	\$2,127.00
	Less Atomic CU Land Lease	<u>(\$1,296.00)</u>
		\$16,338.90
Real Estate Tax	first half	\$32,409.55 nine months
	second half	<u>\$32,409.55</u> nine months
	Less Atomic CU Land Lease	<u>(\$6,394.23)</u>
		<u>\$58,424.87</u>